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IN THE COURT OF APPEALS OF INDIANA

ECLIPSE CONSULTING, INC.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 29A05-0912-CV-696
	)	
COMMUNITY BANK,	)	
	)	
Appellee.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0305-PL-394

September 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Eclipse Consulting, Inc. (Eclipse) appeals the trial court's grant of partial summary judgment in favor of Community Bank (Community). Eclipse presents four issues on appeal, which we consolidate and restate as follows: Did the trial court properly grant summary judgment in favor of Community?

We affirm and remand.

The relevant facts are undisputed. In February 1996, Eclipse entered into a five-year commercial lease with Noblesville Development Outlot Company (NDOC) to commence on March 18, 1996. Under the lease, Eclipse rented approximately 1500 square feet (the Demised Premises) of a 6900-square-foot retail outlot building (the Outlot Building). The Outlot Building was the smaller of two structures owned by NDOC that comprised the Noblesville Square Shopping Center (the Shopping Center). The total building area of the Shopping Center measured about 144,129 square feet. Thus, the total area of the Demised Premises constituted approximately 1.04% of the Shopping Center's and 21.7% of the Outlot Building's constructed leasable space.

In addition to basic rent payments, the lease obligated Eclipse to reimburse NDOC an amount equal to Eclipse's pro rata share of the Shopping Center's real estate taxes, insurance premiums, and common area operating costs. With regard to the common area expenses, Section 11.03 of the lease provided in part:

> (a) During the Demised Term, Tenant shall pay to Landlord, as additional rental in addition to the Minimum Annual Rental specified in this Lease, that portion of the "Shopping Center's Operating Cost"…that the number of square feet of leased area of the Demised Premises bears to the total number of square feet of all the constructed leasable area in the Shopping Center.
> (b) For the purpose of this Section [] the term "Shopping Center's Operating Cost" is hereby defined to mean the total cost and expense incurred in operating, managing, insuring, equipping, lighting, repairing, replacing and

> maintaining the Common Area…and fifteen percent (15%) of all the foregoing costs to cover the Landlord's administrative and overhead costs.

Appellant's Appendix at 130. Regarding taxes, Section 13.01 provided in relevant part:

> Landlord shall pay all real estate and personal property taxes and assessments levied against all or any part of the Demised Premises, the Shopping Center, and the improvements relating thereto installed by the Landlord (the "Taxes and Assessments"). Tenant shall reimburse Landlord…for a portion of all Taxes and Assessments assessed and/or payable during the Demised Term on the Shopping Center…. Tenant shall pay to Landlord that portion of any such Taxes and Assessments which the number of square feet of leased area of the Demised Premises bears to the total number of square feet of all the constructed leasable area in the Shopping Center….

Id. at 131-32. Finally, with respect to insurance, the lease similarly provided for reimbursement to NDOC of Eclipse's "proportionate share" of premiums. *Id*. at 127.

In January 1997, Community purchased the Outlot Building from NDOC and assumed the lease in question. Because it did not purchase the entire Shopping Center, Community calculated Eclipse's pro rata share of taxes, insurance, and common area expenses based solely upon the expenses associated with the Outlot Building and Eclipse's percentage occupancy of that building. In other words, Community allocated to Eclipse 21.7% of the relevant expenses incurred in operating the Outlot Building.

After the expiration of the Demised Term and an agreed-upon extension, Eclipse moved its business to another location. In the process of wrapping up the lease and any outstanding payments due Community, Eclipse's president, Joseph Lamberger, expressed the following in a letter to Community on March 25, 2002:

> I am, though, very disappointed in your decision regarding the security deposit, especially given the number of years of my tenancy. At your suggestion, I have reread the original in-force contract and according to the exact letter of the contract you would be correct on this point.

> However, after closer review of this contract and after your decision to follow the contract *exactly*, I suggest you review Sections 11.03 (a) and 11.03 (c) regarding the calculation of ECLIPSE's percentage of "the Shopping Center's Operating Cost". Additionally, please refer to Section 1.02 and also Exhibit "B"…to find the specific description of "Shopping Center", as defined in this contract. It appears as though Community Bank has been incorrectly calculating ECLIPSE's percentage as 21.7% (see enclosed copies of past estimates from your firm) for the past 5 years. It is extremely difficult for me to believe that my office space of 1500 square feet represents 21.7% of "all constructed leasable area in the Shopping Center"…. It also is apparent that a large overpayment, exceeding $21,000, has been made on ECLIPSE's behalf during that time period. I refer you to Section 11.03 (c) to find that the "Landlord shall reimburse Tenant within thirty (30) days" when such an event occurs.
>
> If you have any questions regarding the above, please feel free to contact me…, otherwise we will assume Community Bank will be sending the overpayment to us within the next thirty (30) days, in order to comply with the terms of the original contract.

Id. at 155 (emphasis in original).

In May 2003, Eclipse filed an eleven-count complaint against Community, alleging breach of contract, fraud, conversion, and bad faith. On May 21, 2007, Community filed for partial summary judgment asking the court, inter alia, to determine as a matter of law that Community properly allocated to Eclipse 21.7% of the taxes, insurance, and common area operating expenses related to the Outlot Building. Further, Community claimed it was entitled to a management fee equal to 15% of the expenses allocated to Eclipse for taxes, insurance, and common area expenses. Following a hearing, the trial court entered partial summary judgment in favor of Community. Specifically, the court concluded that pursuant to the terms of the lease, Community had correctly calculated Eclipse's pro rata percentage share of the relevant expenses to be 21.7% and that Community was entitled to a management fee equal to 15% of said expenses. Because the summary judgment order did

not resolve all issues in the lawsuit, the parties obtained a determination from the trial court under Ind. Trial Rule 54(B) that there was no just reason for delay in entering final judgment upon the partial summary judgment order. Accordingly, Eclipse now appeals.

Our standard of review following the grant of summary judgment is well settled.

> We construe all facts and reasonable inferences to be drawn from those facts in favor of the non-moving party. Summary judgment is appropriate when the designated evidence demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Interpretation of the language in a contract is a question of law especially suited for summary judgment proceedings. We review questions of law de novo, and therefore we give no deference to the trial court's interpretation.

DLZ Indiana, LLC v. Greene County, 902 N.E.2d 323, 327 (Ind. Ct. App. 2009) (citations omitted). Further, a grant of summary judgment may be affirmed upon any theory supported by the designated evidence. *Van Kirk v. Miller*, 869 N.E.2d 534 (Ind. Ct. App. 2007), *trans. denied*.

In the instant case, the dispositive issue before us involves the interpretation of the lease.[1]

> When Indiana courts are called upon to interpret a contract, we apply the four-corners rule, which requires that as to any matter expressly covered in the written contract, the provisions therein, if unambiguous, determine the terms of the contract. Words used in a contract are to be given their usual and common meaning unless, from the contract and the subject matter thereof, it is clear that some other meaning was intended.

[1] On appeal, Eclipse raises as a separate issue that certain portions of Community's evidence were not properly designated to the trial court because the designations did not satisfy the specificity requirements of Ind. Trial Rule 56(C). Eclipse asserts, "there is no properly designated evidence showing Eclipse was aware that a modification of the Lease had been made or that Eclipse's pro rata percentage share of the expenses, taxes, and insurance it was required to pay had been increased." *Appellant's Brief* at 7. Our holding in this case, however, does not turn on theories of waiver, estoppel, or modification. Rather, like the trial court, our interpretation of the lease controls the outcome. Therefore, we need not address this issue.

> We interpret a written contract by reading the contract as a whole, and we attempt to construe the language so as to not render any words, phrases, or terms ineffective or meaningless. Thus, we must accept an interpretation of the contract which harmonizes its provisions. If the language of the contract is unambiguous and the intent of the parties is discernible from the written contract, the court must give effect to the terms of the contract.

DLZ Indiana, LLC v. Greene County, 902 N.E.2d at 327-28 (citations omitted).

Although the parties argued various theories supporting and opposing summary judgment, the trial court granted Community's motion on a very narrow basis. Based on the terms of the lease and the undisputed fact that Community purchased only the Outlot Building, the court determined that the formula set out in the lease for computing Eclipse's pro rata share of taxes, insurance, and common area expenses permitted Community to use the leasable area of the Outlot Building in calculating Eclipse's pro rata share, which was 21.7%. We agree, though for slightly different reasons than expressed by the trial court.

We turn first to sections 1.02 and 1.04 of the lease, which provide:

> Section 1.02. Shopping Center. The Demised Premises are located in the Noblesville Square Shopping Center, the legal description of which is set forth in Exhibit "B" which is attached hereto and by reference made a part hereof (the "Shopping Center"). Landlord reserves the right to add other land and/or buildings to the Shopping Center, in which event the term "Shopping Center" shall include the same.
>
> Section 1.04. Changes in Shopping Center and Common Area. Landlord reserves the right to change the Shopping Center by adding land and/or buildings thereto and/or by changing therein the number and location of buildings, building dimensions, … the number of floors in any of the buildings, store dimensions, Common Area and the identity and type of other stores and tenancies; provided only that the size of the Demised Premises shall not be changed, and reasonable access to the Demised Premises and the parking facilities to be provided shall not be materially impaired.

Appellant's Appendix at 117. These terms grant the landlord broad control over changes to the Shopping Center, exclusive of the Demised Premises of course. While not expressly granted the right to sell only a portion of the Shopping Center, the landlord certainly had the right under section 1.04 to unilaterally make changes that would decrease the overall leasable square footage of the Shopping Center.

Moreover, sections 11.03, 13.01, and 8.04 evidence an overriding intent that Eclipse reimburse the landlord for Eclipse's proportionate share of operating costs, taxes, and insurance premiums incurred by the landlord. To account for changes in the Shopping Center, therefore, the lease provided for a fluctuating percentage based upon the square footage of the Demised Premises compared to the "total number of square feet of all the constructed leasable area in the Shopping Center." *Id*. at 130.

When Community purchased the Outlot Building (with square footage constituting less than five percent of the entire Shopping Center), the sum of the relevant expenses necessarily decreased substantially. It is in this context that the increase of Eclipse's pro rata share from 1.01% to 21.7% must be viewed.[2] Under Eclipse's proposed interpretation of the lease, Eclipse would have been required to reimburse Community for only 1.01% of the expenses associated with the Outlot Building (as opposed to the much larger sum attributable to the entire Shopping Center). In other words, despite the fact Eclipse leased 21.7% of the

[2] The record does not disclose the dollar amount Eclipse paid to NDOC for its share of relevant expenses as compared to the dollar amount Community subsequently charged Eclipse.

building, Eclipse would be required to pay only 1.01% of the associated costs.[3] This is an absurd result and one clearly not intended by the lease.[4]

As set forth above, the clear intent of the lease was that Eclipse pay its pro rata share of the relevant expenses incurred by the landlord based upon the square footage of the Demised Premises as compared to the then-applicable square footage of leasable space owned by the landlord at the Shopping Center. Thus, the trial court did not err in granting partial summary judgment in favor of Community.

Judgment affirmed and remanded for proceedings on the remaining issues not determined by the instant partial summary judgment.

BARNES, J., and CRONE, J., concur.

[3] In its complaint, Eclipse indicated that it should have paid just over $1000 of the more than $100,000 of relevant expenses incurred by Community. This far from reimburses Community for Eclipse's pro rata share of expenses.

[4] Further, even if we looked to the constructed leasable area in the Shopping Center to determine the pro rata share, we would conclude that the area outside of the Outlot Building is not "leasable" because it is not owned by Community.